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No. 03-642

In The
# Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., and COLORADO PERMANENTE MEDICAL GROUP, P.C.,

*Petitioners,*

vs.

KAREN PACHECO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado**

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CIGNA HEALTHCARE OF CALIFORNIA, INC. IN SUPPORT OF PETITIONERS

LISA PERROCHET
JOHN A. TAYLOR, JR.
JEREMY B. ROSEN*

HORVITZ & LEVY LLP
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800 • FAX (818) 995-3157

**Counsel of Record*

*Counsel for Amicus Curiae Cigna HealthCare of California, Inc.*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

CIGNA HealthCare of California, Inc. (CHC) respectfully moves for leave to file the attached belated amicus curiae brief in this case. The consent of the attorney for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

CHC has a direct interest in securing a decision by this Court that contractual arbitration agreements contained in health care plans will be enforced. CHC is a party in *CIGNA HealthCare of Cal., Inc. v. Balaban-Zilke*, Case No. 03-709, which raises the identical "reverse-preemption" issue presented by this case – whether the McCarran-Ferguson Act saves state laws that impose special requirements on arbitration agreements contained in health care plans from preemption by the Federal Arbitration Act. On January 12, 2004, this Court denied CHC's petition for writ of certiorari. CHC has sought rehearing of the denial of its petition based on the pending petition in this case. Moreover, the issues raised by petitioners have been and will continue to be raised in other litigation involving CHC.

Good cause exists for permitting this brief to be filed because it does not merely restate arguments presented by petitioners, but (1) demonstrates that the issue raised by this petition is a recurring "important question of federal law" that has been the subject of numerous conflicting opinions by federal and state courts; (2) amplifies the circuit conflicts identified in the petition involving application of the McCarran-Ferguson Act to save state statutes "enacted . . . for the purpose of regulating the business of insurance" from federal preemption; and (3) raises an

*additional* circuit conflict, not presented in the petition, regarding whether a federal law "specifically relates to the business of insurance" so that it can preempt contrary state insurance laws notwithstanding the McCarran-Ferguson Act.

CHC respectfully requests that this Court accept this belated amicus curiae brief because CHC did not recognize its significant interest in this petition for writ of certiorari until CHC's related petition was denied. By that time, the December 31, 2003 deadline for filing an amicus brief in this case had already passed. Neither party would suffer any undue prejudice if this brief is accepted for filing.

Respectfully submitted,

LISA PERROCHET
JOHN A. TAYLOR, JR.
JEREMY B. ROSEN*

HORVITZ & LEVY LLP
15760 Ventura Boulevard,
18th Floor
Encino, California 91436-3000
(818) 995-0800 •
FAX (818) 995-3157

**Counsel of Record*

*Counsel for Amicus Curiae
Cigna HealthCare of
California, Inc.*

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## AMICUS CURIAE BRIEF OF CIGNA HEALTHCARE OF CALIFORNIA, INC.

### INTEREST OF AMICUS CURIAE[1]

CIGNA HealthCare of California, Inc. (CHC)[2] is a California corporation that operates managed care networks facilitating the provision of medical and hospital services to eligible members. It does not itself treat patients, but merely administrates the payment of claims for health care services provided by doctors. Many of the health care plans offered by CHC contain arbitration provisions requiring the arbitration of all disputes relating to services provided under the plan.

California law, like the Colorado law at issue in this petition, imposes special restrictions on the enforcement of arbitration agreements contained in health care plans. *Compare* Colo. Rev. Stat. § 13-64-403 (2003) *with* Cal. Health & Safety Code § 1363.1 (West 2003). California courts, like the Colorado Supreme Court here, have refused to enforce contractual arbitration provisions that do not comply with state law. *See Balaban-Zilke v. CIGNA HealthCare of Cal., Inc.*, No. B140672, 2003 WL 21228038,

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or its counsel, make a monetary contribution to the preparation or submission of this brief.

[2] CIGNA HealthCare of California, Inc. is a wholly owned subsidiary of Healthsource, Inc. Healthsource, Inc. is a wholly owned subsidiary of CIGNA Health Corporation. CIGNA Health Corporation is a wholly owned subsidiary of Connecticut General Corporation. Connecticut General Corporation is a wholly owned subsidiary of CIGNA Holdings, Inc. CIGNA Holdings, Inc. is a wholly owned subsidiary of CIGNA Corporation. CIGNA Corporation is a public company, traded on the New York Stock Exchange and other exchanges. No single publicly held company owns 10% or more of the stock of CIGNA Corporation.

at *2-6 (Cal. Ct. App. May 28, 2003); *Allen v. Pacheco*, 71 P.3d 375, 377 (Colo. 2003). This Court recently denied CHC's petition for writ of certiorari in the *Balaban-Zilke* case. *See* Jan. 12, 2004 Order in Case No. 03-709. CHC's petition for writ of certiorari raised the identical "reverse preemption" issue as this petition – whether the McCarran-Ferguson Act saves state laws that impose special requirements on arbitration agreements contained in health care plans from preemption by the Federal Arbitration Act. CHC has a strong interest in securing a decision by this Court that contractual arbitration agreements contained in health care plans will be enforced. Moreover, the issues raised by petitioners have been and will continue to be raised in other litigation involving CHC.

CHC has sought rehearing of the denial of its petition for writ of certiorari in the *Balaban-Zilke* case based upon the pending petition in this case. *See, e.g., Simmons v. Sea-Land Servs., Inc.*, 462 U.S. 1114 (1983) (rehearing granted and case remanded in light of Supreme Court opinion in a related case).

## LEGAL BACKGROUND

This case presents one of the most important issues facing the health care and insurance industries today: whether states can impose unique restrictions on the enforcement of mandatory arbitration provisions in health care plans.

Ordinarily, state laws imposing restrictions on arbitration agreements would be preempted by the Federal Arbitration Act. 9 U.S.C.A. § 2; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). In this past term,

this Court reiterated its "presumption in favor of arbitration." *PacifiCare Health Sys., Inc. v. Book*, 123 S. Ct. 1531, 1536 n.2 (2003). This Court also held that the terms "'involving commerce'" in the Federal Arbitration Act are "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003).

However, the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C.A. § 1012(b). The McCarran-Ferguson Act was passed to reaffirm that states have primary regulatory control over insurance. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 40-41 (1996). In enacting the McCarran-Ferguson Act, "Congress was mainly concerned with the relationship between *insurance ratemaking* and the antitrust laws, and with the power of the States to tax insurance companies." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 458-59 (1969) (emphasis added). The purpose of the McCarran-Ferguson Act is "the avoidance of *'inadvertent* federal intrusion' into state insurance regulation," *Patenaude v. Equitable Life Assurance Soc'y of United States*, 290 F.3d 1020, 1026 (9th Cir. 2002), and it "is to be *'narrowly construed* in the face of valid federal regulatory interests.'" *Cochran v. Paco, Inc.*, 606 F.2d 460, 467 (5th Cir. 1979) (emphasis added).

In *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), this Court set forth a three-factor test for determining when a state law regulates

"the business of insurance" under the *second* clause of the McCarran-Ferguson Act applying to antitrust cases.[3] Since *Royal Drug* and *Pireno*, there has been a question in the lower courts as to whether this three-factor test applies in determining whether state laws were "enacted . . . for the purpose of regulating the business of insurance" pursuant to the *first* clause of the McCarran-Ferguson Act in non-antitrust cases. In *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), this Court observed that *Royal Drug* and *Pireno* did not completely determine the scope of the non-antitrust first clause of the McCarran-Ferguson Act.

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[3] The McCarran-Ferguson Act has two clauses that make reference to the "business of insurance." The first clause, applicable to non-antitrust cases, provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose of regulating the business of insurance.*" 15 U.S.C.A. § 1012(b) (emphasis added). The second clause, governing antitrust cases, provides that "the Act . . . known as the Sherman Act . . . and the Act . . . known as the Clayton Act, and the Act . . . known as the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.* The three factors for when a state law constitutes the "business of insurance" under the second clause are "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129.

## SUMMARY OF REASONS FOR GRANTING CERTIORARI

The petition for writ of certiorari raises the question whether the McCarran-Ferguson Act saves state laws that impose special requirements on arbitration agreements contained in health care plans from preemption by the Federal Arbitration Act. This Court should grant the petition.

First, the question presented by this petition is a recurring question in state and federal courts. Some courts have held that the Federal Arbitration Act preempts state laws that impose restrictions on arbitration agreements in health care or insurance plans, while other courts have held that the McCarran-Ferguson Act saves those state laws from preemption.

Second, as demonstrated by the petition, there is a circuit split regarding the correct interpretation of what constitutes a state law enacted "for the purpose of regulating the business of insurance" under the first clause of the McCarran-Ferguson Act. Some courts have held that the *Royal Drug* and *Pireno* three-factor test should still be utilized in first clause cases, while other courts have held that the test has no utility for first clause cases after *Fabe*. There is also an additional circuit split among those circuits that apply the *Royal Drug* and *Pireno* test in first clause cases regarding how broadly to apply the test.

Third, there is an additional circuit split, not addressed in the petition, regarding what constitutes a federal law that "specifically relates to the business of insurance" so that it can preempt contrary state insurance laws. Some courts have held that a federal law can be so

clearly meant to preempt any contrary state law – including insurance laws – that preemption may apply notwithstanding the McCarran-Ferguson Act even if the text of the federal statute does not refer to insurance, while other courts have reached the opposite conclusion.

## LEGAL ARGUMENT

### CERTIORARI SHOULD BE GRANTED TO RESOLVE CIRCUIT CONFLICTS OVER THE INTERPLAY BETWEEN THE MCCARRAN-FERGUSON ACT AND THE FEDERAL ARBITRATION ACT.

#### A. Numerous state and federal courts have reached conflicting decisions over whether the Federal Arbitration Act preempts state laws that impose restrictions on arbitration agreements in health care or insurance contracts.

Numerous states in addition to Colorado prohibit the enforcement of arbitration agreements in health care or insurance plans altogether, or impose special requirements on them before they can be judicially enforced.[4] These

[4] *E.g.*, Alaska Stat. § 09.55.535 (Michie 2003); Cal. Health & Safety Code § 1363.1 (West 2003); Colo. Rev. Stat. § 13-64-403 (2003); Ga. Code Ann. § 9-9-2(c)(3) (2003); Kan. Stat. Ann. § 5-401(c)(1) (2002); 710 Ill. Comp. Stat. Ann. 15/9 (West 2003); La. Rev. Stat. Ann. § 9:4235 (West 2003); Mass. Gen. Laws ch. 175, § 22 (2003); Me. Rev. Stat. Ann. tit. 24-A, § 2747 (West 2003); Mo. Rev. Stat. § 435.350 (2003); Nev. Rev. Stat. 689B.067 (2003); Ohio Rev. Code Ann. § 2711.23-2711.24 (Anderson 2003); Okla. Stat. tit. 15, § 802 (2003); R.I. Gen. Laws § 10-3-2 (2002); S.C. Code Ann. § 15-48-10 (Law Co-op. 2003); S.D. Codified Laws § 21-25B-3 (Michie 2003); Utah Code Ann. § 78-14-17 (2003); Vt. Stat. Ann. tit. 12, § 5653 (2003); Va. Code Ann. § 38.2-5803 (Michie 2003).

statutes have generated a wave of litigation over whether such restrictions on arbitration agreements in health care or insurance plans are preempted by the Federal Arbitration Act, which is designed to prevent states from imposing special rules on arbitration agreements that are not applied to contracts generally.

The courts that have considered the relationship between the McCarran-Ferguson Act and the Federal Arbitration Act are in conflict. Some courts have found that the Federal Arbitration Act preempts state laws that target arbitration agreements in health care or insurance plans[5] and other courts, like the Colorado Supreme Court

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[5] *E.g.*, *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 708-09 (5th Cir. 2002); *St. Paul Fire & Marine Ins. Co. v. Courtney Enters., Inc.*, 270 F.3d 621, 625 (8th Cir. 2001); *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 75-81 (1st Cir. 2000); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972-73 (9th Cir. 1992); *Life of Am. Ins. Co. v. Aetna Life Ins. Co.*, 744 F.2d 409, 411-13 (5th Cir. 1984); *Miller v. Nat'l Fid. Life Ins. Co.*, 588 F.2d 185, 187 (5th Cir. 1979); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 610-11 (2d Cir. 1969); *Bullock v. United Benefit Life Ins. Co.*, 165 F. Supp. 2d 1259, 1261-62 (M.D. Ala. 2001); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 274-75 (D. Vt. 1993); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 750 F. Supp. 455, 459-62 (D. Kan. 1990), *rev'd*, 969 F.2d 931 (10th Cir. 1992); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52, 56-57 (W.D. Mo. 1985); *Bernstein ex rel. Comm'r of Banking & Ins. of the State of Vt. v. Centaur Ins. Co.*, 606 F. Supp. 98, 101-03 (S.D.N.Y. 1984); *Celtic Life Ins. Co. v. McLendon*, 814 So. 2d 222, 226 (Ala. 2001); *Am. Bankers Ins. Co. of Fla. v. Crawford*, 757 So. 2d 1125, 1131-36 (Ala. 1999); *Allen v. Pacheco*, 71 P.3d at 388 (Kourlis, J., dissenting) ("In short, I suggest that the interpretation the Majority affords the McCarran-Ferguson Act sweeps with a broad and wide arc that could swallow federal preemption under the Supremacy Clause."); *Towe, Hester & Erwin, Inc. v. Kan. City Fire & Marine Ins. Co.*, 947 P.2d 594, 597-99 (Okla. Ct. App. 1997);

(Continued on following page)

in this case, have found that such laws are saved from Federal Arbitration Act preemption by the McCarran-Ferguson Act.[6]

As stated by one of the commentators struck by the split among jurisdictions, "courts have reached differing conclusions over whether the McCarran-Ferguson Act precludes Federal Arbitration Act preemption." *See* Jennifer N. Taylor, *Recent Development:* Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. St. U. L. Rev. 257, 272-74 (2000/2001); *see also* Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act – 1941-1993*, 43

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*Preziose v. Lumbermen's Mut. Cas. Co.*, 152 Vt. 604, 605-07, 568 A.2d 397, 398-99 (1989).

[6] *E.g.*, *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001); *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281-82 (10th Cir. 1998); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45-46 (2d Cir. 1995); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 934-35 (10th Cir. 1992); *Eden Fin. Group, Inc. v. Fid. Bankers Life Ins. Co.*, 778 F. Supp. 278, 282 (E.D. Va. 1991); *Washburn v. Corcoran*, 643 F. Supp. 554, 557-58 (S.D.N.Y. 1986); *Zolezzi v. PacifiCare of Cal.*, 129 Cal. Rptr. 2d 526, 539 n.11 (Ct. App. 2003); *Imbler v. PacifiCare of Cal., Inc.*, 126 Cal. Rptr. 2d 715, 717 (Ct. App. 2002); *Pagarigan v. Superior Court*, 126 Cal. Rptr. 2d 124, 134-35 (Ct. App. 2002); *Smith v. PacifiCare Behavioral Health of Cal., Inc.*, 113 Cal. Rptr. 2d 140, 142-44 (Ct. App. 2001); *Allen*, 71 P.3d at 377; *Cont'l Ins. Co. v. Equity Residential Props. Trust*, 565 S.E.2d 603, 604 (Ga. Ct. App. 2002); *Friday v. Trinity Universal of Kan.*, 939 P.2d 869, 872-73 (Kan. 1997); *In re Liquidation of Union Indem. Ins. Co. of N.Y.*, 521 N.Y.S.2d 617, 620-21 (N.Y. Sup. Ct. 1987); *Cox v. Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 401-02 (S.C. Ct. App. 2001).

Cath. U. L. Rev. 399, 431-32 (1994). Another commentator, describing the split among the circuits, has noted that "Accepting certiorari on [*United States Department of Treasury v. Fabe*, 508 U.S. 491], the Supreme Court failed to define the relationship between the McCarran-Ferguson Act and the [Federal Arbitration Act]. . . . This lack of direction from the Supreme Court has led to a split in the circuits on the question of whether the [Federal Arbitration Act] applies to insurance contracts. The Tenth Circuit's decision marks a rare instance where other public policy concerns outweigh the presumption favoring arbitrability. [The Tenth Circuit's decision] further marks the rare instance where the presumption favoring arbitrability is overcome, not by a congressional command, but by judicial directive." Kristen Angus, *Tenth Circuit Surveys: Arbitration*, 76 Denv. U. L. Rev. 681, 692 (1999).

### B. The circuits that apply the *Royal Drug* and *Pireno* test in non-antitrust first clause cases are split over how the test applies.

The petition for writ of certiorari and reply brief in support of the petition amply demonstrate that the lower courts are in conflict over when a state law has been "enacted . . . for the purpose of regulating the business of insurance." *See* Allen Pet. at 9-19; Allen Reply Br. at 3-8. The Third, Sixth, Seventh, and Ninth Circuits have held that *Fabe* does not abrogate the use of the three-factor test from *Royal Drug* and *Pireno* in non-antitrust cases. *E.g.*, *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 191 & n.3 (3d Cir. 1998); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 391-92 (6th Cir. 1994); *Am. Deposit Corp. v. Schacht*, 84 F.3d 834, 840 (7th Cir. 1996); *Merchs. Home Delivery Serv., Inc. v. Hall & Co.*, 50 F.3d 1486, 1490 n.2 (9th Cir. 1995).

Meanwhile the Eighth Circuit has held that in such cases, *Fabe* completely abrogates use of the three-factor test. *E.g.*, *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997), *overruled on other grounds*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 305 n.6 & 314 (1999).

Even in those circuits that still utilize the *Royal Drug/Pireno* test in some manner for first clause cases, there is an additional circuit split over the degree of utility that test retains. The split centers on the question of whether it is relevant that the defendant's challenged conduct in the case actually constitutes the business of insurance, or whether McCarran-Ferguson reverse preemption is triggered so long as the particular state statute invoked by the plaintiff is intended to regulate the business of insurance.

*Third Circuit:* The Third Circuit has remarked on this circuit split: "We note at the outset that federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion. . . . Some courts draw upon a four-part inquiry. . . . Other courts have announced a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance." *Sabo*, 137 F.3d at 189 n.2.

*Ninth Circuit:* The Ninth Circuit employs a four-part inquiry to determine whether the McCarran-Ferguson Act precludes the preemption of a state insurance law by another federal statute in non-antitrust first clause cases: "(1) [the federal] statute does not 'specifically relate' to [the] business of insurance, (2) [the] acts challenged under the [state] statute constitute [the] business of insurance,

(3) [the] state has enacted a law or laws regulating [the] challenged acts, and (4) [the] state law would be superseded, impaired or invalidated by the application of [the] federal statute." *Merchs. Home Delivery Serv., Inc.*, 50 F.3d at 1489. The important aspect of this approach is the second factor, which requires that defendant's conduct itself constitutes the business of insurance.

*Seventh Circuit:* The Seventh Circuit directly challenges the Ninth Circuit's requirement that the defendant's conduct itself constitutes the business of insurance. Instead, the Seventh Circuit employs a three-part test that focuses on the purpose behind the state statute that is sought to be preempted: "first, does the federal statute at issue 'specifically relate to the business of insurance;' second, was the state statute 'enacted . . . for the purpose of regulating the business of insurance;' and third, would application of the federal statute 'invalidate, impair or supersede' the state law." *Autry v. Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1040-41 (7th Cir. 1998).[7]

The Seventh Circuit rejects the Ninth Circuit's four-part test because "[t]he four-part test requires the court to examine the activity at issue to determine whether the activity being regulated is part of the 'business of insurance.' However, the statutory language counsels us to examine the *purpose for which the statute was enacted* to determine whether the statute is one 'enacted . . . for the

[7] The first and third parts of the Seventh Circuit's test are identical to the first and fourth parts of the Ninth Circuit's test. The split in authority centers around the difference between the Seventh Circuit's second part of the test and the Ninth Circuit's second and third parts of the test.

purpose of regulating the business of insurance.' While this distinction may seem somewhat semantic, the effect is far from inconsequential." *Id.* at 1041.

### C. There is a circuit split, in addition to that identified by petitioners, over the determination of when a federal statute "specifically relates to the business of insurance."

#### 1. This Court has not fully resolved the meaning of "specifically relates" as used in the McCarran-Ferguson Act.

Although not addressed by the petition, an additional circuit conflict is also implicated by this case – whether a federal law whose text does not refer to insurance, such as the Federal Arbitration Act, can be so clearly meant to preempt any contrary state law (including insurance laws) that preemption may apply notwithstanding the McCarran-Ferguson Act.

This court has only once addressed the meaning of the phrase "specifically relates" in the first clause of the McCarran-Ferguson Act, providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act *specifically relates to the business of insurance*." 15 U.S.C.A. § 1012(b) (emphasis added). In *Barnett Bank of Marion County, N.A.*, 517 U.S. 25, this court noted that "[t]he word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts." *Id.* at 38. "'specifically' can mean 'explicitly, particularly, [or] definitely.'" *Id.* Applying that definition, this court found that a law that "grants national banks permission to 'act as the agent for any fire,

life, or other insurance company,' to 'solici[t] and sel[l] insurance'" *did* "specifically relate" to insurance. *Id.* at 39.

*Barnett* does not resolve the question implicated here, because the statute in *Barnett* involved a law that did refer to insurance in its text. *Barnett* thus left open the question of whether a federal law can be so clearly intended to preempt all contrary state laws, including those relating to insurance, that the McCarran-Ferguson Act does not apply regardless of whether the law refers to insurance in its text.

**2. Some courts have held that a federal law can preempt a state insurance law even if the federal law does not refer to insurance in its text.**

*Second Circuit:* The Second Circuit has interpreted the McCarran-Ferguson Act quite narrowly on this point. In *Spirt v. Teachers Insurance and Annuity Ass'n*, the court determined that Title VII applied to an insurance company and preempted a contrary state law even though Title VII did not specifically provide that it was meant to apply to insurance. 691 F.2d 1054, 1065-66 (2d Cir. 1982), *vacated on other grounds*, *Teachers Ins. & Annuity Ass'n v. Spirt*, 463 U.S. 1223 (1983), *reinstated on other grounds*, *Spirt v. Teachers Ins. & Annuity Ass'n*, 735 F.2d 23 (2d Cir. 1984). The court relied on the "broad and explicit preemption provision" contained in Title VII and on the fact that "Title VII is not being *construed* to *implicitly* pre-empt state laws." *Spirt*, 691 F.2d at 1065.

In *Stephens v. National Distillers and Chemical Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1995), the court was confronted with the question of whether the McCarran-Ferguson Act precluded the Foreign Sovereign Immunities Act (FSIA)

from preempting a contrary state law. The court recognized that the state law in question regulated the business of insurance and that the FSIA did *not* refer to insurance in its text. *Id.* Nonetheless, the court held that the FSIA preempted the state law: "the McCarran-Ferguson Act does not preclude the preempting of New York's pre-judgment security requirement. The Supreme Court's language in *Fabe* in no way compels such a broad reading of the McCarran-Ferguson Act, while prior case law in this Court, at the very least, recommends a narrower reading of the statute." *Id.* The court recognized that where a federal statute has a "'broad and explicit preemptive provision'" and "wherever federal law clearly intends to displace all state laws to the contrary," then the McCarran-Ferguson Act provides no bar to the federal law's application to insurance even if there is not a specific reference to insurance made in the text of the statute. *Id.* at 1232-33; *see also Bernstein*, 606 F. Supp. at 101 n.6 ("The Second Circuit has found that the lack of an explicit reference to insurance in a federal law does not automatically place it within the McCarran-Ferguson Act."). In *Stephens*, the Second Circuit also reaffirmed its pre-*Fabe* holding in *Spirt v. Teachers Ins. & Annuity Ass'n. See Stephens*, 69 F.3d at 1233.

The Second Circuit has also held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) is not reverse-preempted by the McCarran-Ferguson Act even though SLUSA does not refer to insurance in its text. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 116-17 (2d Cir. 2001). In support of its holding, the court noted that "[i]t is only when a statute, by unintended implication, encroaches on the insurance regulatory regime of a state that McCarran-Ferguson prevents

application of the federal statute. . . . But when the intended effect of a federal statute is to displace state regulations, we must give effect to this intent, regardless of whether an insurance company is involved." *Id.* The court also noted that "Congress passed SLUSA to provide uniform, national standards for litigation concerning a defined set of nationally marketed securities . . . – a topic undisputably of national concern." *Id.* at 117.

*Eleventh Circuit:* The Eleventh Circuit has acknowledged the Second Circuit's conclusion that the McCarran-Ferguson Act does not apply to a federal law that is clearly meant to apply to insurance, even though it does not refer to insurance in its text: "[t]here has been some suggestion that the McCarran-Ferguson reverse preemption provisions should not apply in the context of the Bank Act, because the Bank Act was by its nature intended to preempt all conflicting state laws. In other contexts, federal laws involving issues of paramount national concern – such as the Foreign Sovereign Immunities Act (FSIA) and the Civil Rights Act of 1964 (Title VII) – have been held to be exempt from the reverse preemption provisions of McCarran-Ferguson." *Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1244 n.10 (11th Cir. 1999). The court ultimately found that the Bank Act did not rise to the same level of national concern as the FSIA or Title VII, but did not explain when a national policy embodied in a federal law becomes sufficiently important so as to preempt state laws notwithstanding the McCarran-Ferguson Act. *Id.* at 1244.

*Other courts:* Other courts have also found that federal statutes can apply to preempt contrary state insurance laws *notwithstanding* their failure to specifically refer to insurance. *E.g.*, *Md. Cas. Co. v. Cushing*, 347

U.S. 409, 422 (1954) (Federal Maritime Law); *Sears, Roebuck & Co. v. All States Life Ins. Co.*, 246 F.2d 161, 172 (5th Cir. 1957) (Lanham Act).

### 3. Other courts have held that if the text of a federal law does not refer to insurance, then it cannot "specifically relate to insurance."

*Seventh Circuit:* The Seventh Circuit has directly challenged the Second Circuit's decision in *Spirt* and has offered a broader reading of the McCarran-Ferguson Act: "'No Act of Congress' could not be more comprehensive. The McCarran-Ferguson Act creates a rule of construction applicable to all other federal laws, a 'plain statement' approach. . . . The second circuit [in *Spirt*] posed the wrong question when inquiring whether Congress meant to insulate the insurance business from civil rights laws. Congress did not tie its hands; instead it prescribed the consequences of silence and specificity in other acts past and future. . . . [F]ederal laws inconsistent with state laws apply when Congress says so directly." *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294-95 (7th Cir. 1992). Consequently, the court held that Title VIII cannot preempt contrary state insurance laws because Title VIII does not specifically refer to insurance in its preemption provision. *Id.* at 295.

*Fifth and Eighth Circuits:* Other courts have also held that a federal statute that does not refer to insurance in its text cannot preempt any contrary state insurance laws because of the McCarran-Ferguson Act. *E.g.*, *Cochran v. Paco, Inc.*, 606 F.2d at 464 (Truth in Lending Act); *Murff v.*

*Prof'l Med. Ins. Co.*, 97 F.3d 289, 291 (8th Cir. 1996) (Age Discrimination in Employment Act).

## CONCLUSION

This case involves numerous circuit splits over important issues regarding the interaction between the McCarran-Ferguson Act and the Federal Arbitration Act. Accordingly, certiorari is warranted. Moreover, the McCarran-Ferguson Act and the Federal Arbitration Act are both important federal statutes which are frequent subjects of litigation in state and federal courts. The intersection of these two important federal statutes has caused tremendous difficulty in the lower courts, and it is incumbent on this Court to provide guidance to the lower courts on the questions presented by this petition.

Respectfully submitted,

LISA PERROCHET
JOHN A. TAYLOR, JR.
JEREMY B. ROSEN*
HORVITZ & LEVY LLP

**Counsel of Record*

*Attorneys for Amicus Curiae Cigna HealthCare of California, Inc.*